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No. 88-1866

In the Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE MCNABB, PETITIONER

v.

LAURO F. CAVAZOS, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an arbitration panel, convened pursuant to the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, to arbitrate a dispute between a blind vendor and a State, has authority to award retroactive money damages against the State.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 862 F.2d 681. The order of the district court (Pet. App. A14-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1989. A petition for rehearing was denied on February 17, 1989 (Pet. App. A41). The petition for a writ of certiorari was filed on May 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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STATEMENT

1. This case arises under the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, which establishes a cooperative federal-state scheme for licensing, training, and placing qualified blind persons in vending facilities on federal, state, and other property. The Secretary of Education administers the Act, and state agencies approved by the Secretary license and train vendors and select facilities. Section 107d-1(a), added by the 1974 amendments to the Act (Pub. L. No. 893-651, Title II, § 206, 89 Stat. 2-11), provides that any blind vendor who is dissatisfied with the action of a state agency "may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute." 20 U.S.C. 107d-1(a). The arbitration decision is subject to judicial review. 20 U.S.C. 107d-2(a).

Petitioner is a blind person who has been licensed by respondent Arkansas Department of Human Services, Division of Services for the Blind, the agency responsible for administering the Randolph-Sheppard Act in Arkansas. In April 1981 petitioner filed a complaint with the Secretary pursuant to Section 107d-1(a) requesting that an arbitration panel be convened. He complained that two vending facilities for which he had bid, and which were more profitable than the facility he was operating, had been awarded to vendors with less seniority, in violation of applicable regulations.[1]

After being advised by the Department of Education that a panel would be convened, petitioner amended his complaint to seek "back pay" (the difference between his profits and those of the facilities for which he had bid) and attorney's fees. Thereafter, the Department informed peti-

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[1] As required by the Act (20 U.S.C. 107d-1(a)), petitioner had first requested, and was granted, a full evidentiary hearing by the state agency, which upheld the denial of the vending stands to petitioner.

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tioner and the panel of its position that an arbitration award of retroactive money damages and attorney's fees against a State were contrary to the Act and violated the principle of sovereign immunity embodied in the Eleventh Amendment. It also advised the parties of its view that Section 107d-2(d) does not authorize the Secretary to pay attorney's fees as part of the "reasonable costs of arbitration."

The arbitration panel found that the state agency had improperly failed to select petitioner for the two vending facilities. As relief, the panel awarded petitioner preferential consideration for future vending facilities, but declined to rule on his request for back pay and attorney's fees. The panel also provided that, following petitioner's acceptance or refusal of a future vending facility, he could request that the panel be reconvened for the purpose of hearing his claim for additional relief. Pet. App. A29-A35.

After accepting an assignment to a new vending facility in 1985, petitioner requested that the arbitration panel be reconvened to consider his claims for compensatory damages and attorney's fees. The Department of Education advised petitioner that, in accordance with its previously stated position, the arbitration panel would not be reconvened.

2. Petitioner then filed this action challenging the decision not to reconvene the arbitration panel. The district court (Pet. App. A18-A19) granted summary judgment in favor of petitioner, basing its decision on *Delaware Department of Health & Social Services* v. *United States Department of Education*, 772 F.2d 1123 (3d Cir. 1985). In that case, a blind vendor licensed by the State of Delaware to participate in the Randolph-Sheppard Act program had appealed from a district court's judgment

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vacating an arbitration panel's award of back pay and attorney's fees. The court of appeals reversed, reasoning that by creating an arbitration remedy in the Act, Congress meant to incorporate the powers generally available to arbitrators in other contexts, including the authority to award "retrospective compensatory relief in appropriate cases." *Id.* at 1136. The court held that Delaware had waived its sovereign immunity by its participation in the Randolph-Sheppard Act program. *Id.* at 1137-1138.

Adopting the rationale of the Third Circuit's decision, the district court found that "an arbitration panel convened pursuant to the Randolph-Sheppard Act *does* have the authority to award compensatory relief and attorney's fees.' Pet. App. A19. Accordingly, the district court directed the Secretary "to reconvene an arbitration panel to consider the award of compensatory relief, attorney's fees and costs to [petitioner]." *Ibid.*

3. In a per curiam decision from which each judge wrote a separate opinion concurring and dissenting, the court of appeals affirmed the district court's order to the Secretary to reconvene the arbitration panel. However, the court of appeals held that the panel could award prospective damages only, *i.e.*, from the date of the panel's decision (December 29, 1983) to the date petitioner accepted assignment to a new vending facility (October 10, 1985). The court left to the arbitration panel initial consideration of the attorney's fees issue. Pet. App. A5.

Chief Judge Lay, in his separate opinion, stated that "the Act authorizes arbitration panels to assess compensatory damage awards against state agencies and that Congress had abrogated sovereign immunity for states which participate in the blind vendor program." Pet. App. A5-A6. He surmised that Congress, in adopting arbitration, must have contemplated that States would be subject

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to all the remedies traditionally available in arbitration proceedings, including the award of retrospective monetary relief. *Id.* at A8-A9. On the other hand, Judge Fagg took the position that the Act's silence with respect to the remedial powers of an arbitration panel precluded a finding that Congress conditioned the State's participation in the blind licensee program on their accepting responsibility for the payment of money "later deemed appropriate to make the wronged licensee whole." *Id.* at A9-A10. Thus, Judge Fagg would have held that the Act does not authorize *any* awards of money damages against the States. *Id.* at A12. Judge Doty, whose opinion provided the basis for the per curiam order with respect to damages, concluded that "[w]hen the Act is viewed against the backdrop of the Eleventh Amendment, it is seen that Congress only intended that the arbitration panel * * * have the necessary implied powers to grant prospective relief, and did not intend to abrogate the state's rights under the Constitution." *Id.* at A13.[2]

ARGUMENT

1. The court of appeals' holding that a Randolph-Sheppard Act arbitration panel may not award retroactive money damages is correct. Nothing in the language of the Act expresses with sufficient clarity any intent to abrogate the sovereign immunity of the States. Nor is there a basis for finding a waiver of that immunity on the part of the States themselves.

[2] Judge Doty dissented from the decision of the other two judges that the question whether attorney's fees should be awarded should be decided in the first instance by the arbitration panel. Pet. App. A9 (opinion of Lay, J.); *id.* at A12 (opinion of Fagg, J.). He would have held that panels may order recovery of attorney's fees. *Id.* at A13 (opinion of Doty, J.). Petitioner does not challenge the court's resolution of that issue, and neither do we.

In several recent cases, this Court has stressed the stringency of the standard to be applied in determining whether Congress has abrogated the sovereign immunity of the States under the Eleventh Amendment.[3] In *Dellmuth* v. *Muth,* 109 S. Ct. 2397, 2401 (1989), the Court held that "in this area of the law, evidence of congressional intent must be both unequivocal and textual." Similarly, in *Pennsylvania* v. *Union Gas Co.,* 109 S. Ct. 2273, 2277 (1989) (opinion of Brennan, J.) (citing *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985)), the Court recognized that when Congress abrogates the States' constitutionally secured immunity "it must make its intent to do so 'unmistakably clear.' " And the Court has imposed a similarly stringent standard for determining that state sovereign immunity has been waived. As stated in *Welch* v. *Texas Department of Highways & Public Transportation,* 483 U.S. 468, 473 (1987) (opinion of Powell, J.) (citations omitted), "because '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights,' the Court will find a waiver by the State 'only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." ' "

Judged by these standards, the Randolph-Sheppard Act does not authorize awards of retroactive money damages with sufficient clarity to justify a finding that state sovereign immunity has been abrogated or waived. The Act nowhere mentions money damages. Rather, it merely

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[3] The Amendment prohibits the extension of "the [j]udicial power of the United States * * * to any suit in law or equity" against a state by citizens of another state or a foreign state. U.S. Const. Amend. XI. This Court long ago held that an unconsenting state also is immune from suits brought by one of its own citizens. *Hans* v. *Louisiana*, 134 U.S. 1, 21 (1890).

authorizes arbitration. While it is true that labor arbitrators frequently make awards of retroactive money damages, that fact is an insufficient premise for a finding of legislative abrogation in light of this Court's insistence on a clear statement in the language of the statute itself before retroactive damages may be awarded against a State. In *Dellmuth*, this Court recognized that the "statutory structure [of the Education of the Handicapped Act] lends force to the inference that the States were intended to be subject to damages actions." 109 S. Ct. at 2402. However, the Court held: "[S]uch a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which * * * is necessary before we will determine that Congress intended to exercise its powers of abrogation." *Ibid.* And a finding of waiver by the States is similarly precluded. A "state's informed choice to accept an obligation to pay money damages cannot rest on an implied statutory authorization" (Pet. App. A11 (opinion of Fagg, J.)), and "Congress did not make it unambiguous that the state's participation in the blind vendors program would result in a waiver of its sovereign immunity or condition its participation on accepting all forms of monetary relief, including retroactive damages" (*id.* at A13 (opinion of Doty, J.)).

The Third Circuit reached a contrary conclusion in *Delaware Department of Health and Social Services*, and petitioner primarily contends (Pet. 8-10) that review is warranted on account of the disagreement between the decision below and the decision in that case. However, *Delaware Department of Health and Social Services* was decided prior to this Court's decisions in *Dellmuth, Union Gas*, and *Welch*. Moreover, the Third Circuit relied upon *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964), in reaching its decision (see 772 F.2d at 1137-1138), and this

Court overruled *Parden* in *Welch*. 483 U.S. at 478 (opinion of Powell, J.), 496 (opinion of Scalia, J.). Thus, "the legal underpinnings of that case [*Delaware Department of Health and Social Services*] have been fatally eroded." Pet. App. A13 (opinion of Doty, J.). The Third Circuit should be allowed to reconsider the question in light of this Court's recent decisions before review by this Court is warranted.

2. a. Review is not warranted to consider petitioner's contention, made only in passing (Pet. 12-13), that the Eleventh Amendment has no relevance to this case because the Randolph-Sheppard Act authorizes arbitration rather than a court action.[4] Regardless of whether the Eleventh Amendment directly governs the arbitration proceedings in this case, the decision below is correct. For, in determining whether state sovereign immunity from retrospective damage awards has been abrogated or waived, the stringent standards applicable to federal judicial proceedings should apply to federal arbitration proceedings as well.

The principles of federalism and of respect for state sovereignty that underlie the Eleventh Amendment apply with equal force to federally convened arbitration panels because, just like a district court, a panel convened to resolve a dispute with a State through the application of federal law and regulations is a federal adjudicative instrumentality. Since those principles afford protection against "federal judgments requiring payment of money that would interfere with the State's fiscal autonomy and

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[4] No court has decided this question in petitioner's favor. Judge Lay assumed "for the purposes of argument * * * that an enforcement proceeding in federal courts of an arbitration award against the state would violate the eleventh amendment." Pet. App. A8 n.2. Similarly, the Third Circuit assumed, without deciding, that the Amendment applies in this context. 772 F.2d at 1138.

thus its political sovereignty" (*Jagnandan* v. *Giles,* 538 F.2d 1166, 1176 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977)), they are fully applicable in the present case.[5]

Moreover, under the Act, an arbitration panel's decision is "subject to appeal and review as a final agency action for purposes of [the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*]." 20 U.S.C. 107d-2(a). Thus, if an arbitration panel awarded relief in the form of back pay and judicial review was sought, it would fall upon a federal court to decide whether or not to enforce the award. In such a suit, the court would be asked to do that which it is powerless to do under the Eleventh Amendment, *i.e.*, award compensation against a State for past wrongs.

b. Finally, review is not warranted to consider petitioner's related argument (Pet. 11) that the court of appeals' decision "impedes effectuation of the policies Congress sought to promote when it amended the Randolph-Sheppard Act to provide for arbitration." The major goals of the 1974 amendments were to strengthen the program through a greater commitment to the placement of blind vendors on federal facilties and to halt the erosion of the vendors' economic well-being caused by increased competition with vending machines, federal employee controlled vending operations, and minority business concerns. S. Rep. No. 937, 93d Cong., 2d Sess. 10-11 (1974). An arbitration panel whose authority is limited to prospective relief has broad power to issue

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[5] The cases relied upon by petitioner (Pet. 12) do not command a different result since they merely stand for the proposition that Congress has the power to provide for arbitration as an alternative dispute-resolution forum without contravening the powers of Article III courts. *E.g.*, *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 571 (1985). Moreover, none of those cases involved a dispute between a citizen and a State and thus the Eleventh Amendment and principles of sovereign immunity were not implicated.

orders—such as an order to cease and desist, to take corrective action, or to give preferential treatment in the future—in furtherance of those goals. Thus, the statutory scheme can function effectively, and the purposes of the statute can be fully served, if arbitration panels resolve disputes between blind vendors and the States through prospective decrees. See Pet. App. A13 (opinion of Doty, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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